RECORD AND BRIEFS

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Nos. 16A1190 & 16-1436

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPLICATION FOR STAY

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MONTANA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND THEIR STAY APPLICATION

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MOTION FOR LEAVE TO FILE

The States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi respectfully move for leave to file a brief as amici curiae in support of petitioners' stay application and to file the enclosed amicus brief supporting petitioners and their stay application without 10 days' advance notice to the parties of amici's intent to file. *See* Sup. Ct. R. 37.2(a).

The parties consent to the filing of the enclosed amicus brief.

Amici also respectfully request that the Court consider the arguments herein and in the enclosed amicus brief in support of petitioners' stay application in *Trump v. Hawaii*, No. 16A1191 (S. Ct. filed June 1, 2017).

1. *Statement of Movants' Interest.* The district court order enjoined in part Executive Order 13,780, signed by the President on March 6, 2017, and entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal government to set the terms and conditions for whether aliens may enter the States. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest. Amici's view on the standards governing plaintiffs'

challenge to the Executive Order "may be of considerable help to the Court." Sup. Ct. R. 37.1.

2. *Statement Regarding Brief Form and Timing.* Given the expedited consideration of this matter of significant national interest, amici respectfully request leave to file the enclosed brief supporting petitioners and their stay application without 10 days' advance notice to the parties of intent to file. The district court heard oral argument on March 15, 2017, and entered its injunction that day. The en banc court of appeals heard oral argument on May 8. On May 25, the court of appeals affirmed in part and vacated in part the injunction, and denied petitioners' motion for a stay pending appeal as moot. The petition for a writ of certiorari and application for stay and for expedited briefing and consideration in this Court were filed on June 1. On June 2, this Court ordered a response to these filings by June 12. This accelerated timing justifies the request to file the enclosed amicus brief supporting petitioners and their stay application without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in support of petitioners and their stay application.

Respectfully submitted.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal Executive Branch to restrict or set the terms of aliens' entry into the States for public-safety and national-security reasons, pursuant to the laws of Congress. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012). And the Immigration and Nationality Act (INA) gives the Executive significant authority to suspend aliens' entry into the country. Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest.

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[1] Pursuant to Supreme Court Rule 37.2, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to the preparation or submission of this brief. The parties consented to the filing of this brief. Due to the nature of the expedited relief sought in this case of national significance, amici were unable to notify the parties of amici's intent to file 10 days before filing. Thus, amici submit an accompanying motion for leave to file this brief. Amici also respectfully request that the Court consider the arguments herein in support of petitioners' stay application in *Trump v. Hawaii*, No. 16A1191 (S. Ct. filed June 1, 2017).

SUMMARY OF ARGUMENT

The district court's injunction of the President's temporary suspension of entry for specified classes of nonresident aliens is remarkable. The injunction was issued despite *three* longstanding doctrines limiting the availability of judicial remedies for disagreement with policy decisions like the Executive Order here.

First, the Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry. And this Court has specifically recognized that there is no "judicial remedy" to override the Executive's use of its delegated 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry into this country. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Second, the Order must be accorded "the strongest of presumptions and the widest latitude of judicial interpretation," because it is in *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Third, the Court has long accorded facially neutral government actions a presumption of validity and good faith, so those actions can be invalidated under a discriminatory-purpose analysis only if there is the clearest proof of pretext. This longstanding, exacting standard for judicial scrutiny of government motives has been recognized by this Court in multiple types of constitutional challenges. *See infra* Part III.A. This limit respects institutional roles by precluding courts from engaging in a tenuous "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).

Plaintiffs cannot satisfy this Court's exacting standards for showing that the Executive Order is pretext masking a religious classification. The Order classifies aliens according to nationality based on concerns about the government's ability to adequately vet nationals of six covered countries who seek entry. Not only that, but these six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." The Order is therefore valid, as it provides a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

Campaign-trail statements regarding a potential future policy are far from the clearest proof needed to overcome the strong presumption of validity accorded to a different policy adopted by the President after he assumed the responsibilities of office and consulted with multiple high-ranking government officials. Accepting plaintiffs' arguments would discount the well-founded reasons for the exacting nature of a pretext challenge to neutral government actions.

This injunction is contrary to law, and it denies the federal government—under a statutory regime crafted by the representatives from the States in Congress—the latitude necessary to make national-security, foreign-affairs, and immigration policy judgments inherent in this country's nature as a sovereign. The Court should grant the petition and the stay application.

ARGUMENT

Plaintiffs must overcome *three* doctrines cabining the availability of judicial relief for their disagreement with the Executive Order's national-security decision on immigration policy. First, the Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry into the country. Second, the Order must be accorded the strongest of presumptions of validity because it is within *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. Third, a discriminatory-purpose challenge to facially neutral government action entails an exacting standard requiring the clearest proof of pretext.

Plaintiffs' claims fail under each of these three doctrines, any one of which is an independent bar to their claims. The injunction should therefore be stayed and ultimately reversed.

I. Nonresident Aliens Abroad Possess No Constitutional Rights Regarding Entry into This Country, and the Constitutional Provisions Invoked by Plaintiffs Do Not Extend Extraterritorially.

Plaintiffs challenged the Executive Order as violating rights against religious discrimination under the equal-protection component of the Fifth Amendment's Due Process Clause and under the Establishment Clause. First Am. Compl. ¶¶ 220-25, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361, Docket entry No. 93 (D. Md. Mar. 10, 2017). Plaintiffs' theory is the same as to both Clauses—that the Executive Order is a pretext for discrimination on account of religion.

That theory for relief is fundamentally untenable. Nonresident aliens outside territory under clear United States control possess no constitutional rights regarding the terms on which they may enter the country: It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Consequently, the Due Process Clause and Establishment Clause provide no "judicial remedy" to override the President's 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry. *Sale*, 509 U.S. at 188; *see id.* ("agree[ing] with the conclusion expressed in Judge Edwards' concurring opinion" regarding statutory and constitutional challenges in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987): "'there is *no solution to be found in a judicial remedy*'" overriding the Executive's exercise of § 1182(f) authority (emphasis added)).

This Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Rather, the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Constitution does not regulate immigration policy regarding foreign citizens who are neither resident

nor present in United States territory. The Court has therefore recognized a key distinction between aliens inside versus outside the United States, according the former certain constitutional rights while not extending those rights to the latter. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *cf. Boumediene v. Bush*, 553 U.S. 723, 754 (2008) (involving (1) lengthy detention, rather than entry denial, at (2) Guantanamo Bay, where the United States had "plenary control, or practical sovereignty").

What is more, Congress has repeatedly designated members of certain religious groups—such as Soviet Jews, Evangelical Christians, and members of the Ukrainian Orthodox Church—as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation). That accepted practice underscores the inapplicability in this context of the religious-nondiscrimination rights invoked by plaintiffs.

Plaintiffs cannot make an end-run around the territorial limits on constitutional rights by relying on the alleged stigmatizing effect on individuals within the United States of a challenged decision about whether *nonresident aliens outside* this country are admitted. To hold otherwise would allow bootstrapping a constitutional claim based on government action regulating only aliens beyond constitutional protection. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed

on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated *other* persons who possessed no constitutional rights regarding entry. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing doctrine in a challenge to the expenditure of government funds in foreign countries).

II. The Executive Order Receives "the Strongest of Presumptions" of Validity Because It Is Within *Youngstown*'s First Category as Executive Action Pursuant to Power Delegated Expressly by Congress.

Even assuming for argument's sake that the constitutional protections invoked by plaintiffs could apply extraterritorially to aliens subject to the Executive Order, plaintiffs would face an exacting standard for review of their claim.

The President's action here is accorded "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). That is because the Order is within *Youngstown*'s first zone of executive action: Congress expressly delegated to the President the authority he exercised here. *See infra* pp. 8-9. The burden of persuasion will therefore "rest heavily upon" plaintiffs, as the parties challenging the President's *Youngstown*-zone-one action. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

A. The Executive Order temporarily suspends the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents (LPRs) of the United States, were outside this country ten days after the Executive Order issued, and do not qualify for other exceptions (such as holding a valid visa ten days after the Executive Order issued); and
- aliens seeking entry under the U.S. Refugee Admissions Program.

Executive Order 13,780 (EO) §§ 2, 3, 6, 82 Fed. Reg. 13,209, 13,212-16 (Mar. 9, 2017). This Executive Order exercises authority that Congress expressly delegated.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress too has recognized this sovereign power to exclude aliens, giving the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an

alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's broad § 1182(f) power to suspend the entry of aliens, Congress also provided that the Executive "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding (as opposed to an entry denial), if the "revocation provides the sole ground for removal." *Id.*

And, as to refugees, the President's power to limit alien admission is authorized, not only by § 1182(f), but also by the INA's separate delegation to the President of power to control refugee admissions. *Id.* § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)).

2. Any challenge to congressional authorization for the Order's nationality-based suspension of entry under § 1182(f) founders on this Court's decision in *Sale*, 509 U.S. at 187-88. *Sale* held—in terms equally applicable here—that no "judicial remedy" exists to override the Executive's use of its § 1182(f) power to deny entry to specified classes of nonresident aliens. *Id.* at 188 (quoting *Gracey*, 809 F.2d at 841 (Edwards, J., concurring)).

Sale is fatal to any claim that the Order here is unauthorized by the INA. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our

shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

Likewise here. Congress's broad delegation of authority to suspend the entry of classes of aliens is not undermined by 8 U.S.C. § 1152(a)(1)(A), which makes no mention of § 1182(f). Section 1152(a)(1)(A) does not address the entry of aliens into the country at all. Instead, it is part of a set of restrictions on the issuance of *immigrant visas*—that is, permission for aliens to seek admission for permanent residence. *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier nationality-based quota system for allocating immigrant visas, § 1152(a)(1)(A) provides:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict requirement for repeal by implication). An alien's *entry* into this country is a different and much more consequential event than the pre-

liminary step of receiving a *visa*, which merely entitles the alien to apply for admission into the country. *See* 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. Visa possession does not control or guarantee entry; the INA provides several ways in which visa-holding aliens can be denied entry. *E.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the President suspended the entry of Cuban nationals as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986); *see also* Pet. App. 166a & n.2 (C.A. am. op.) (Niemeyer, J., dissenting) (citing additional examples). Plaintiffs point to no instance in which the government has read § 1152(a)(1)(A)'s visa-allocation provisions as prohibiting nationality-based suspensions of entry under § 1182(f).

In all events, § 1152(a)(1)(A) applies only to *immigrant* visas, and does not cover other prospective entrants, such as those seeking *nonimmigrant* visas. So, even on plaintiffs' view, this section cannot possibly establish that § 2 of the Order is statutorily unauthorized as applied to aliens seeking entry as nonimmigrants.[2]

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[2] Similarly, refugee admission does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So § 1152(a)(1)(A)'s provisions regarding immigrant-visa issuance, even on plaintiffs' view, cannot show that Congress somehow withheld authority for the refugee-program directives in § 6 of the Order.

3. Nor is the President's § 1182(f) authority to suspend aliens' entry limited by 8 U.S.C. § 1182(a), which also makes no mention of § 1182(f). *Cf.* Mem. in Support of Mot. for TRO 29-37, *Hawaii v. Trump*, No. 1:17-cv-50, Docket entry No. 65-1 (D. Haw. Mar. 8, 2017) (Hawaii plaintiffs' argument on this provision). In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to this country, unless an exception applies. Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary."

As the District of Columbia Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not within one of the enumerated § 1182(a) categories that automatically make aliens inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

B. Executive action in the first *Youngstown* zone—exercising power delegated by Congress—is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674. Overcoming this strongest presumption is a burden that rests "heavily" on a challenger. *Id.*

This significant burden is well-founded here, not only because of the explicit congressional grant of authority to *deny* entry, 8 U.S.C. § 1182(f), but also because of the INA's complementary approach to *allowing* entry. Specifically, Congress enacted "extensive and complex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 132 S. Ct. at 2499; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress imposed these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously provided the Executive broad authority to *exclude* aliens from the country, under § 1182(f).

The President's authority in this context therefore "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). The injunction here is thus remarkable for interfering with a decision authorized by two

branches of government. And it does so in a particularly sensitive area. The admission of aliens into this country is a federal prerogative "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

The strong presumption of validity due under *Youngstown* underscores that any judicial scrutiny of the President's decisions in the Executive Order must be highly deferential. Because the Executive Order involves the national-security, foreign-affairs, and immigration powers of Congress and the President, it receives the strongest presumption of validity. Plaintiffs cannot surmount that presumption here. And when the Executive expresses its "reasons for deeming nationals of a particular country a special threat," then "a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AADC*).

III. Plaintiffs Cannot Satisfy the Exacting Standard that Applies to Discriminatory-Purpose Challenges to Facially Neutral Government Actions.

As this Court has recognized for years and in many different contexts, a discriminatory-purpose challenge to facially neutral government action faces an exacting standard. The Court has articulated this exacting standard in different ways, but the central principle in this well-established body of case law is that only the clearest proof of pretext can invalidate a facially neutral government action. *See infra* pp. 16-18. This high standard for overriding government action by discerning a discriminatory purpose respects the "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted).

That heavy presumption cannot be overcome by plaintiffs' arguments here, especially given the Executive Order's detailed national-security findings, the resonance of those findings in determinations of numerous federal officials, and the judicial deference owed to executive decisions in this context. The lower courts' analysis deeming the Executive Order pretext for a religious test discounts those weighty considerations, and it undermines the sound reasons for the exacting standard required to invalidate facially neutral government action based on an alleged discriminatory purpose.

A. An exacting standard insulates government action from being deemed a discriminatory pretext absent the clearest proof to the contrary.

A discriminatory-purpose challenge to facially neutral government action faces an exacting standard under this Court's precedents: it requires the clearest proof of pretext.

1. This exacting standard for discriminatory-purpose challenges is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *Triplett*, 494 U.S. at 721.

And this presumption of constitutionality applies with particular force to the foreign-affairs and national-security determinations at issue here. *See AADC*, 525 U.S. at 491. After all, "[u]nlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene*, 553 U.S. at 797.

2. Consequently, this Court "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington*

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977); *see also Washington v. Trump*, No. 17-35105, slip op. 7 (9th Cir. Mar. 17, 2017) (Kozinski, J., dissenting from denial of rehearing en banc). The Court has therefore permitted a discriminatory-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted a discriminatory-purpose analysis of government action, this Court has concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained for the Court over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing. 6 Cranch at 128.

The Court has thus repeatedly explained, in various contexts, that only clear proof of pretext can allow courts to override facially neutral government actions. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979)

(rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).

- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).
- "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make little "practical sense." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005).

This exacting standard for a discriminatory-purpose challenge to facially neutral government action exists for good reason. It keeps a purpose inquiry judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

B. The Order here, which classifies aliens by nationality and reflects national-security concerns, cannot be deemed a pretext for a religious test.

The Executive Order classifies aliens by nationality—not religion.[3] The Order's temporary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.*

The Executive Order therefore is emphatically not a "Muslim ban." Numerous majority-Muslim countries in the world are not covered by the Executive Order, and data from the Pew-Templeton Global Religious Futures Project indicates that the six countries covered by the

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[3] Because the Executive Order classifies aliens by nationality, and not religion, any equal-protection analysis possibly applicable under the Constitution, *but see supra* Part I, subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

Executive Order contain only about 10% of the world's Muslims.[4]

The Order finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." EO § 2(c). All six of these countries were already included in the list of seven "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)." EO § 1(b)(i), (f). That set of seven countries under 8 U.S.C. § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The Order then explains at length the rationale for ordering a pause in entry for nationals of the six covered countries. *See* EO §§ 1-2. Those restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order thus further directs that, while entry from those countries is paused, the Secretary of Homeland Security in consultation with the Secretary of State and Director of National Intelligence undertake a worldwide review to identify what information is needed from foreign coun-

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[4] *See Muslim Population by Country: 2010*, Pew-Templeton Global Religious Futures Project (last visited June 5, 2017), http://www.globalreligiousfutures.org/religions/muslims (providing statistics on Muslim population as a percentage of total population on a per-country basis).

tries to allow adequate screening of entrants. Then, the Secretary must submit reports to the President naming any country that these officials believe should be added to or removed from the list of countries subject to a suspension of entry. EO § 2(a)-(b), (d)-(g).

Moreover, before the current Administration took office, numerous federal officials—including the FBI Director,[5] the Director of National Intelligence,[6] and the Assistant Director of the FBI's Counterterrorism Division[7]—expressed concerns about the country's current ability to vet alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[8] and "groups like ISIS may seek to exploit the current refugee flows."[9] The national-security interests implicated

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[5] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

[6] *Id.*

[7] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[8] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[9] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terrorist Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

by the ongoing War on Terror against radical Islamic terrorists have been recognized since the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).[10]

Given this national-security grounding, a challenge to the Executive Order as a pretext for religious discrimination must fail. Ample reason exists for courts to leave undisturbed the delicate policy judgments inherent in the Executive Order, as these decisions must account for factors indicating a heightened national-security risk that warrants a particular course of action regarding the Nation's borders. Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797; *AADC*, 525 U.S. at 491. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Order's detailed explanation of its national-security

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[10] *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

basis, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 20-22, and (3) the exacting standard for deeming facially neutral government action pretext for a discriminatory purpose, *see supra* Part III.A. Furthermore, this Court has recognized the limited significance of campaign statements made before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Washington v. Trump*, slip. op. 4-7 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernment officials are irrelevant for determining whether the Executive Branch took action as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

Plaintiffs' claim that the Order is pretext for a religious classification thus fails. The Order must be accorded the strongest presumption of validity as *Youngstown*-zone-one action. *See supra* Part II. And the Order is accorded the heavy presumption that facially neutral government action is valid and taken in good faith. *See supra* Part III.A.

Especially with those presumptions in mind, the Executive provided a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770; *see also Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment) (federal government official informing alien of visa denial based expressly on statutory provision is a "facially legitimate and bona fide" reason under *Mandel*). Courts therefore must "neither look behind

the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.[11]

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[11] In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a panel of the Ninth Circuit erroneously concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. *Id.* at 1164-65. As this Court has recognized, no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Nonresident aliens abroad have no constitutionally protected interest in entering the United States. *See Mandel*, 408 U.S. at 762. Regardless, whatever process could possibly be due was satisfied here by the Executive Order's "facially legitimate" public proclamation prospectively announcing an exercise of the Executive's § 1182(f) authority. *Id.* at 770. The *Washington v. Trump* panel posited that four categories of aliens, other than lawful permanent residents, may have "potential" claims to due-process protections, 847 F.3d at 1166, which was incorrect because those aliens lack due-process rights and actionable claims, *see* Amicus Br. for State of Texas et al., *Hawaii v. Trump*, No. 17-15589, at 22-25 (9th Cir. Apr. 10, 2017).

CONCLUSION

The Court should grant the petition for a writ of certiorari and the stay application.

Respectfully submitted.

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